IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 426 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE J.R.VORA

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge?

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STATE OF GUJARAT - Appellant(s)
Versus
BHIKHABHAI BHOLABHAI KOLI – Respondent(s)

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Appearance :

MR KP RAWAL, ADDL. PUBLIC PROSECUTOR for Appellant(s) : 1,
MR PP MAJMUDAR for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE J.R.VORA

and

HONOURABLE MR.JUSTICE M.R. SHAH

Date : 22/10/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE J.R.VORA)

1. Leave to appeal granted. Appeal admitted. Mr.Yogeshwar Patel, learned Advocate for Mr.P.P.Majmudar, learned Advocate waives service of notice of admission on behalf of respondent. Learned Advocate Mr.Patel and Mr.Raval, learned APP requested this Court to hear the matter finally as Record and Proceedings of the learned trial Court is available with Court and that they would provide extra copies of evidence recorded during the trial and documents produced before the learned trial Court. In the facts and circumstance of the case, the request is granted and the matter is taken for final hearing.

2. Instant appeal is preferred by the State against the judgment and order delivered by the learned Additional Sessions Judge at Amerli on 09.04.2004 in Sessions Case No.161 of 2001 whereby the present respondent came to be acquitted by the learned trial Court for the offence punishable under Section 302 of the Indian Penal Code as well as under Section 37(1) of the Bombay Police Act.

3. As per the brief facts of the prosecution case, incident in question occurred on 30.05.1994. Accused at the relevant juncture was doing agricultural work in the field of deceased Patel Pravinbhai Kadvabhai in the partnership. The accused has five daughters and three sons. Two daughters are married and others are staying with the accused. On the earlier day i.e. on 29.05.1994, the accused was working in the field for the whole of night and thereafter, some guests came at the house of brother-in-law – Popatbhai Mohanbhai. Those guests were to go to some other village and they insisted the accused to accompany them. The accused agreed to go to Maandan Gam. His daughter i.e. Vimuben was present at the field and he instructed Vimuben to water the field by machine and watch over the field. Thereafter, at about 9.00 a.m. when he started with the guests to go to Maandan Gam while they were proceedings, deceased Pravinbhai Kadvabhai' was going to their field; and Pravinbhai was conveyed that all of them were going to village Maandan. In the meantime, the accused felt that by pipe line from the field of Popatbhai, water was to be drawn in the

field of Pravinbhai and since pipe line was available in the tractor, the accused took out pipe line and as necessary arrangements were to be made for the flow of water. For that he requested his guests to go ahead and stated that after doing needful about the pipe line, the accused would follow the guests. Therefore, the accused followed the tractor of the deceased Pravinbhai and returned to the field of Pravinbhai. When he reached at the field, he found deceased 'Pravinbhai' and his daughter 'Vimuben' in indecent position and Vimuben was putting her cloths while 'Pravinbhai' was wearing his pants. When the accused asked about what had taken place, Vimuben stated that the deceased had raped her. In excitement the accused took axe which was lying there and ran after the deceased Pravinbhai who attempted to board the tractor. He inflicted a blow of an axe on the head of the deceased. He also inflicted other blows of Axe on the body of deceased Pravinbhai. However, as per the prosecution case at about 15.00 hrs, the accused presented himself before the Police Sub Inspector, Savarkundla and narrated the story which was recorded by Police Sub Inspector in the form of

First Information Report. A crime came to be registered against the accused vide Crime Registered No.I – 95 of 1994 for the above charges and investigation was entrusted to PW – 20 – Babubhai Rasiklal Mehta. He recorded statements; draw necessary panchnama and arrested accused on 31.05.1994. Muddamal was sent to Forensic Science Laboratory and thereafter, since PW-20 was transferred from the said Police Station, his successor Mr.H.U.Shiram, submitted charge-sheet in the Court of learned Judicial Magistrate First Class, Savarkundla.

4. Learned Judicial Magistrate First Class, registered the crime and he committed the said case to the Court of Sessions which was registered as Sessions Case No.161 of 2001 in the Court of Sessions at Amerli. The said case thereafter was committed to the learned Additional Sessions Judge, who framed charges against the accused on 10.02.2004 vide Exh.3. Accused pleaded not guilty and therefore, the prosecution examined as many as 20 witnesses and produced on record voluminous documentary evidence.

Thereafter, the learned trial Judge had drawn the attention of the accused to incriminating circumstances appearing against him in the evidence and his statement was recorded under Section 313 of the Criminal Procedure Code. The accused further stated that he was innocent and false case was filed against him. He was at his residence at relevant juncture and the P.S.I. had been to his house and obtained his thumb impression and that he has not filed any complaint in respect of incident in question. The learned trial Judge thereafter heard the prosecution as well as the defence and came to the conclusion to acquit the accused of above said charges and hence this appeal.

5. Mr.K.P.Raval, learned Additional Public Prosecutor for the State and Mr.Yogeshwar Patel, learned Advocate for Mr.P.P.Majmudar, learned Advocate appearing on behalf of the respondent were heard in great detail.

6. We have gone through Record and Proceedings carefully and thoroughly. We have re-appreciated the

evidence recorded during trial to assess reasoning and conclusion arrived at by the learned trial Court in the said Sessions Case. We have considered the vital features of the matter and reasonable probabilities arising out of circumstances of the case with reference to the evidence recorded and appreciation of the evidence undertaken by the learned trial Court. We have examined the reasons assigned by the learned trial Court for acquitting the accused of the charges as this is an appeal against the judgment and order of acquittal.

7. When we have turned to the evidence of the prosecution case, PW-1-examined at Exh.6 – Dr.Chandresh Haljibhai Javeri, stated that he was serving at Savarkundla K.K.Hospital and performed Post Mortem of the dead body on 30.05.1994 between 3.30 p.m. to 4.40 p.m. He noted the injuries in Column No.17 of the Post Mortem note and internal injuries corresponding to said external injury. In his opinion death was caused due to 'hemorrhagic shock due to injury in neck and skull'. It is noteworthy that death of Pravinbhai was homicidal is

not disputed by the defence. PW-2 -Pravinkumar Manrupgiri examined at Exh.11, PW-3 examined at Exh.12 - Umarbhai Dadabhai are panchs of panchnama of discovery, as produced on record vide Exh.34. According to the prosecution case, the accused on 31.05.1994 voluntarily appeared before the police as well as before the two witnesses and stated that he wanted to show something about crime and took panchs and police to river viz. 'Navli'. From the bank of that river near residential colony known as Indira colony in which the accused stated to have his house, from one heap of garbage he took out axe which was attached by the police. He has also shown clothes worn by him at the time of committing the crime which was discovered by the accused and attached by the police. However, none of the witnesses i.e. PW-2 and PW-3 supported the panchnama Exh-34 and stated that on ready made panchnama both the panchs signed and except that they did not know anything. PW-2 -Pravinkumar is also panch of Panchnama of scene of offence at Exh.33 but he is not supporting this panchnama. PW-3 – Umerbhai Dadabhai who is second panch of panchnama has also turned hostile. PW-4 –

Hasmukhbhai Mudbhai examined at Exh.13 is the panch of panchnama by which clothes worn by Vimuben were attached by the police. Blood stain samples were obtained by F.S.L. Officer in the presence of this Panch. Those two panchnamas are produced at Exhs.36 and 37. However, PW-4 – Hasmukhbhai has not supported the above said panchnama and has turned hostile. PW-5 – Alaraka Alibhai examined at Exh.14 is the witness of panchnama by which blood samples and hair samples of the deceased and accused were attached by the police and said Panchnama is recorded at Exh.38 but the said witness has not supported the prosecution case. PW-6 Ibrahimbhai Bachubhai is second panch of panchnama at Exh.38 and he has also not supported the prosecution case. PW-7 – Shardaben Popatbhai examined at Exh.16 is relative of deceased. She was examined as witness because according to prosecution case, accused made extra judicial confession before this witness that on account of rape by the deceased upon his daughter Vimuben, he had killed the deceased. However, this witness- Shardaben has not supported the prosecution case and stated that neither accused nor Vimubhen had conveyed anything to her. PW-8 –

Punabaiben Bhikabhai examined at Exh.17 is wife of the accused and has been cross-examined for the purpose that accused made extra judicial confession before this witness that he had killed the deceased. The witness has turned hostile, was confronted with her police statement which she denied. PW-9– Savitaben Maganbhai examined at Exh.18 is daughter-in-law of the accused and has been examined for the purpose of proving extra judicial confession of the accused made before this witness. She has also not supported the prosecution case. PW-10 – Banuben Bhikabhai examined at Exh.19 is daughter of accused and has been examined for the purpose of proving extra judicial confession but she has not supported the prosecution case. PW-11 – Sureshbhai Kadvabhai examined at Exh.20 is real brother of the deceased. He has no personal knowledge and while he was at his residence his cousin informed him that Pravinbhai has been shifted to hospital. When he visited the hospital, he found Pravinbhai in injured condition and unconscious. Afterwards he came to know from Bhupatbhai that accused had inflicted injuries on the deceased. His evidence is not useful to the

prosecution. Bhupatbhai Pargjibhai PW-12 examined at Exh.21 is cousin brother of the deceased and according to him one Ramesh Nanjibhai informed him that somebody is injured in the field of Pravinbhai and therefore, Bhupatbhai visited said field and found that Pravinbhai was in serious condition and then took him in the tractor to the hospital. Pravinbhai was unconscious and from other persons he came to know that accused had inflicted injuries on Pravinbhai. PW-13-Ukabhai examined at Exh.22 is also person accompanied with Bhupatbhai to visit field of the deceased and found deceased in injured condition. He has no personal knowledge. PW-14 – Sambubhai Ravjibhai examined at Exh.23 is relative of the accused. He was examined because while returning half way of the village where he was going with the guest, he informed this witness that he had no reliance upon Pravinbhai because 'Vimuben' was alone at the field. Therefore, he returned to the field. When the accused returned after half an hour to his residence, he found his clothes with blood stains and on inquiry he conveyed to this person that Pravinbhai was raping his daughter Vimuben. Therefore, in excitement he had

killed Pravinbhai. However, this witness has not supported the prosecution case in any manner. He has also denied these facts before police. PW-15 – Virjibhai Shamjibhai examined at Exh.24 is also witness. He is also not supporting the prosecution case. PW-16 – Habibbhai Adambhai examined at Exh.25 is panch of panchnama at Exh.35 – panchnama of clothes attached by the police. PW-17 – Pravinchandra Maganbhai examined at Exh.26 was working as PSO, Savarkundla Police Station on 30.05.1994 and Savarkundla PSI forwarded him the complaint of the accused for registering it. He registered it as Crime Registered No.55 of 1994. He produced on record vide Exhs.27 and 28 necessary extracts of the record of police station, Savarkundla. PW-18 examined at Exh.29 – Arjundev Kaduram was deputed to KK Hospital to obtain blood samples of deceased after post mortem. He obtained two boxes sealed by the hospital, which contained blood samples of deceased and hair samples of the deceased. In other boxes, blood samples of the accused was also there. He presented this before the police station which were attached by the Investigating Officer in the presence of panchs. PW-

19 – Vimuben Bhikabhai examined at Exh.30 is the daughter of the accused and it is the prosecution case that because deceased attempted to rape this witness, and that was seen by the accused, he got excited and inflicted injuries upon deceased by the axe. Further this witness did not support in any manner the prosecution case. She has been examined by the prosecution in detail but nothing fruitful could be extracted in cross examination by the prosecution which can be useful to prove the case. PW-20 – Babubhai Rasiklal examined at Exh.31 was the then PSI, Savarkundla Police Station and investigation of the case was entrusted to him. He recorded the statement; draw panchnamas and thereafter he was transferred and he entrusted investigation to his successor who filed charge-sheet.

8. These is all is the evidence of the prosecution. Necessary it is to note that the case rests on circumstantial evidence only. The First Information Report as disclosed in the prosecution case has been preferred by the accused himself and

law was set into motion and the crime was investigated. The question is whether FIR narrated by the accused containing incriminating statement can be looked into. In the matter of ***Aghnoo Nagesia v/s. State of Bihar*** reported in *AIR 1966 SC 119*, the Hon'ble Apex Court has established that such F.I.R. by the accused is hit by Section 25 of the Indian Evidence Act though a part of which that is not incriminating can be looked into. But the Hon'ble Apex Court warned that said separability tests was dangerous and therefore, as observed by the Hon'ble Apex Court in para 18 of the said decision what can be proved by the FIR given by the informant is to the extent that accused gave complaint before the police only and nothing beyond that can be considered by the Court. The statement of the accused made in the FIR and which is incriminating is hit by Section 25 of the Indian Evidence Act.

9. When we are looking for circumstantial evidence we find that the prosecution attempted to prove its case three folds: One by extra judicial confession of the accused before witnesses. Second by

discovery of weapon and third blood stains on the clothes of the accused. As we have appreciated evidence on record, we find that prosecution failed to prove extra judicial confession made by the accused. Such witnesses have not supported the prosecution case in any manner. So far as the discovery of weapon – axe and blood stains on the clothes of the accused are concerned, though panchanama has been drawn by Investigating Officer – PW-20 but panchs of said Panchanam which is at Exh.34, PW-2 – Pravinkumar and PW-3– Umarbhai examined at Exh.11 and 12 have not supported the prosecution case. True that discovery can be proved by the Investigating Officer, but when we appreciated evidence of the Investigating Officer, we find that said panchanama is not proved in the evidence of PW-20 – Babubhai Rasiklal Mehta also. It is stated by him to the extent that accused voluntarily stated in his presence and presence of panchs that he was willing to discover axe which he had concealed at his house and thereafter the accused led to them to residential house of the accused and axe was recovered. However, this panchnama was not shown to

the Investigating Officer nor attempt was made by the prosecution to get the signatures of panchas to prove in the deposition of this witness. As per record, this panchnama of discovery is placed at Exh.34, but neither signature of the panchs nor signature of this witness was proved in support of panchnama at Exh.34. The learned trial Court therefore, rightly did not place on reliance on this circumstantial discovery of weapon and clothes from the house of the accused at the instance of the accused. Circumstances in respect of blood as well as clothes of the accused, the prosecution failed to prove that those clothes firstly were discovered at the instance of the accused vide panchnama- Exh.34. For that the prosecution has also failed to prove that blood group of the deceased which was on the clothes of the accused. This was because prosecution could not place on record serological record of the F.S.L. to ascertain blood group of blood on weapon as well as on the clothes of the accused. Thus, while there is no iota of evidence against the accused – present respondent, the prosecution failed in all respect to establish any circumstances incriminating accused in

any manner and hence, the learned trial Judge acquitted the accused.

10. This is an appeal against the acquittal and the scope of this appeal is well defined. There may be second legitimate view possible from the evidence recorded during trial than the view taken by the learned trial Court. Judgment and order of acquittal is not permitted to be interfered unless it is found that reasoning and conclusions arrived at by the learned trial Court are perverse, manifestly erroneous, palpably wrong and demonstrably unsustainable. When we appreciated evidence as aforesaid, we also came to the conclusion that the prosecution has failed to prove case against accused beyond doubt. For the same reasons, the learned trial Court has also acquitted the accused for the charges levelled against him. However, we have no hesitation in coming to the conclusion that the judgment and order impugned in this appeal warrants no interference. Therefore, following order :

ORDER

The appeal fails and is dismissed.

[J.R.Vora, J.]

[M.R.Shah, J.]

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